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No. 80-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, *Intervenor.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

1. The opposition brief of the NLRB demonstrates just how sharply drawn and critically important are the issues in this case. Petitioner's principal contention is that the Board's decisions below violated the express terms of the NLRA and this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), by failing to make any finding that the multiplant unit resulting from the alleged "merger" of the Charlotte and other Westinghouse—IUE units constituted an "appropriate" unit within the meaning of Section 9(b) of the Act and by further failing to articulate the relationship between this putative

"merger" and the factors traditionally deemed relevant to any determination of unit "appropriateness." The Board, in its response, readily admits that its decision below included no finding that the multiplant unit including the Charlotte employees was "appropriate." It admits that its decision "did not . . . directly address such customary indicia of appropriateness as proximity of plants, integration of functions, and common management" (NLRB Br. Opp. 7). According to the government, none of this was required because in rendering its decision to dismiss the employees decertification petition "it found the parties' bargaining history dispositive" (*id.*).

The government's contention, plainly stated, is that whenever an employer and union agree to redraft the lines of a bargaining unit, the Board will not inquire as to the appropriateness of that unit. The Board's quotation of *Brom Machine & Foundry Co.* v. *NLRB*, 569 F.2d 1042, 1043 (8th Cir. 1978), as the "established principle[] of law" in this case reveals, as petitioner initially suggested (Pet. 18), that this is indeed the principle that the Board invoked in this case. According to the Board (quoting *Brom*):

> If the certified unit has been changed by contract, the Board [] lies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.

While *Brom* may be an "established principle" in its own context, it was never intended to and cannot obviate the clear language of Section 9(b). *Brom* is not, as the Board suggests, support for the proposition that whenever a union and employer agree to bargain on a multiplant basis, the Board is somehow relieved

of its statutory obligation to determine "in each case" the appropriateness of the resulting unit.

The government's approach is wholly incompatible not only with Section 9(b) of the NLRA, but also with this Court's decision in *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); and its validity is belied by the Board's own decisions in *e.g.*, *Hygrade Food Products Corp.*, 85 N.L.R.B. 841, 847 (1949), and *Joseph Schlitz Brewing Co.*, 206 N.L.R.B. 928 (1973). Neither *White-Westinghouse Corp.*, 299 N.L.R.B. 667 (1977), *enforced sub nom. IUE* v. *NLRB*, 604 F.2d 689 (D.C. Cir. 1979), nor *General Electric Co.*, 180 N.L.R.B. 1094 (1970), the two cases relied on by the Board, supports a contention that "bargaining history" between an employer and union supplants the statutory requirement that "[t]he Board *shall* decide in each case . . . the unit appropriate for purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). These cases, like many others, hold that bargaining history between the parties is *a factor* to be considered in determining unit appropriateness, but it is not a dispositive factor. *See, e.g., Libbey-Owens-Ford Co.* v. *NLRB*, 495 F.2d 1195, 1199-1200 (3d Cir. 1974); *cf. NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965) ("extent of union organization" is "one factor" but not a controlling factor, in unit determination).[1]

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[1] Moreover, even on its merits the decision below that the "bargaining history" supports a finding of merger is highly suspect. It is not true, as the Court of Appeals stated, that the single multiplant unit "embrac[ed] all of Westinghouse's plants" (Pet. App. 3a). It is also not true, as Board counsel states, that no single plant unit within the coverage of the National Agreement has ever subsequently been excluded, except in instances where a plant has

Moreover, even were bargaining history a dispositive factor, there is simply no way to square the Board's naked assertion in its decisions below that "a controlling history of multiplant bargaining" existed between the parties with the clear command of this Court in *Metropolitan Life* that the Board *explain* rather than simply assert its conclusion in Section 9 cases. *Id.* at 442-44. Now, in its brief, Board counsel attempts repeatedly to correct this patent deficiency by supplying its own reasoning. The brief states, for example:

> Since the Board provided a thorough and detailed explanation of how the parties' bargaining history established the appropriateness of the multiplant unit for collective bargaining purposes (Pet. App. 7-12), there is no merit to petitioner's assertion . . . that the Board failed to articulate properly the basis for its determination in violation of this Court's decision in [*Metropolitan Life*].

(NLRB Br. Opp. 8 n.12). Nowhere in the cited passages of the Board's opinion, however, is there so much as a word explaining "how the Board's bargaining history established the appropriateness of the multiplant unit for collective bargaining purposes . . . ." Board counsel now also claims that the decisions below found that "the parties had created a strong 'com-

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been sold or closed (NLRB Br. Opp. 2 n.4). The record documents several instances in which other unions have attempted, sometimes successfully, to displace the IUE as the bargaining representative even in plants then covered by the National Agreement (B. 530-771). And in at least one other instance, *Westinghouse Electric Corp., Sharon Transformer Div.*, 129 N.L.R.B. 1204 (1961), the Board actually divided a single plant unit covered by the National Agreement into two separate bargaining units. As for the bargaining history of the Charlotte plant, that unit to this day has never negotiated on anything but a purely local level.

munity of interest' among employees who had come to share a broad range of contractually defined terms and conditions of employment negotiated on a group basis" (Pet. App. 8-14). But again one will search the Board opinion in vain to find any such "community of interest" finding. As petitioner pointed out in its earlier brief, it is precisely this finding and others like it that were made in *e.g., White-Westinghouse,* 229 N.L.R.B. at 674-75, and *Libbey-Owens-Ford,* 495 F.2d at 1199-1201, yet are absent from the Board decisions in this case. The government's attempt now to rehabilitate the deficient decisions below by supplying this missing reasoning violates this Court's clear prohibition in *Metropolitan Life* against "post hoc rationalizations" by Board counsel of a Board decision. 380 U.S. at 442-44. If nothing else, this case must be remanded with directions that the Board itself make express findings on whether, and if so why, the multiplant unit is "appropriate".

2. The government's attempt to reconcile its decision below with Section 7 of the Act is revealed by the Board's extraordinary effort to justify its finding that the Charlotte employees had "sufficient" notice that they would be merged into a multiplant unit. The Board acknowledges that the Charlotte employees had no voice whatsoever in the decision to incorporate their Board-certified unit into the terms of the National Agreement but argues that since copies of the National Agreement were circulated during the election campaign, the employees "*should have been aware* that by voting for representation by the union . . . , they would forever lose their right to a unit limited to the Charlotte plant" (NLRB Br. Opp. 9 n.13) (emphasis added).

To say the least, this principle of "constructive" knowledge on the part of lay workers unversed in the intricacies of labor law is utterly incompatible with a decent respect for employee rights under Section 7 of the Act. That workers in a hitherto non-union plant would understand simply by reading a copy of the National Agreement (which consistently refers to constituent "bargaining *units*") that voting to establish a certified local unit might forever bind them into a group encompassing 20,000 workers spread across the country is completely unrealistic. Indeed, its implausibility is demonstrated by a decision of the same Board panel in another case only two weeks prior to the decision in this case. In *Chrysler Corp.*, 227 N.L.R.B. 1256 (1977), the Board invalidated a work rule prohibiting solicitation and distribution of literature except such "as is protected by the National Labor Relations Act." The Board reasoned that the employees, not being labor lawyers, could not possibly be expected to understand what the NLRA provided, and therefore their exercise of statutorily protected rights might be "chilled" by that rule.[2]

Although it tries, the government cannot distinguish *Duke Power Co.*, 191 N.L.R.B. 308 (1971), from this case. In *Duke Power* the union opposed employees'

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[2] The Court of Appeals subsequently denied enforcement of the Board's decision in *Chrysler Corp.* on the basis of the Court's factual finding that the record demonstrated that, since the rule had been in effect for so long, no employee had been misled and thus no rights had been chilled. *Chrysler Corp.* v. *NLRB*, 595 F.2d 364 (6th Cir. 1979). In this case, by contrast, the record contains testimony from Charlotte employees indicating that they had specifically been told that if they joined the union and didn't like it, they could dissolve the union by election (*e.g.*, A. 172, 182).

decertification petition on the grounds, as here, that the individual units involved had been merged into a single multiplant unit. The Board granted the single-plant elections, holding (191 N.L.R.B. at 312):

> We do not agree with the Union's contention that the bargaining history has rendered inappropriate, for purposes of a decertification election, separate steam plant units. At two of the steam plants the Board has certified the Union as the bargaining agent in a unit composed solely of that particular steam plant. The employees were not given the option to choose at the time of the Board's election at these two steam plants whether they wished to be associated with the larger collective-bargaining unit.

This holding is precisely applicable to the petition filed in this case. It demonstrates the Board's error below and identifies a clear conflict within the Board itself as to how cases like this must be administered under the Act. Lower courts have recognized that "[t]he problem whether one or more of an employer's plants constitutes an appropriate bargaining unit has been particularly thorny for the Board." *Operating Engineers Local 627* v. *NLRB*, 595 F.2d 844, 848 n.12 (D.C. Cir. 1979). This case provides a unique opportunity to clarify the Board's uncertainty and to revitalize the guarantees of the NLRA.

3. Nothing in the Board's opposition controverts the fact that its decision has deprived the employees in a recently certified single-plant bargaining unit of any meaningful opportunity ever to decertify the union. The Board argues that subsequent negotiations or a unit clarification petition are remedies that in the fu-

ture may free the Charlotte employees from the "merged" bargaining unit or from the union as a whole (NLRB Br. Opp. 10). But these "remedies" are illusory. The individual employees have no leverage whatsoever to negotiate, and Westinghouse cannot insist on a negotiated change because the scope of a bargaining unit is not a mandatory subject of collective bargaining. There will be no negotiation unless the union decides to alter its position, and this very case is solid evidence that this eventuality is not going to happen.

As regards the supposed unit clarification remedy, Section 102.60(b) of the Board's rules and regulations bars employees from instituting this procedure. And even were Westinghouse to file such a petition, the issues before the Board, and presumably the result, would be precisely the same as those raised and rejected below. As for the asserted "election" that the Board may order "if [i]t finds that the preferences of the employees are relevant" (NLRB Br. Opp. 10), at least two members of the Board are of the opinion that the Board lacks statutory authority to hold an employee election pursuant to a unit clarification petition. *See Libbey-Owens-Ford Co.* v. *NLRB,* 495 F.2d 1195, 1197, 1198 (3d Cir. 1974). The only case in which such an election was ever held was *Libbey-Owens-Ford Glass Co.,* 169 N.L.R.B. 126 (1968), and the Court of Appeals for the Third Circuit, reviewing that decision six years later, noted that "the Board has consistently refused since 1968 to follow and apply "the *Libbey-Owens-Ford* doctrine, even in cases in which were virtually indistinguishable." 495 F.2d at 1198, 1207 (quot-

ing NLRB Chairman Miller). The fact of the matter is that if this Court denies review, the Charlotte employees, and untold thousands like them, will forever be consigned to multiplant units in which they have no effective voice and which they did not choose to join.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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